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No. 02-1623

Supreme Court, U.S.
FILED
JUL 8 - 2003
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

TULARE COUNTY, *et al.*,

Petitioners,

v.

GEORGE W. BUSH, *et al.*, NATURAL RESOURCES DEFENSE COUNCIL, *et al.*, PEOPLE OF THE STATE OF CALIFORNIA. *ex rel.* BILL LOCKYER, ATTORNEY GENERAL,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BILL LOCKYER, Attorney General of California
RICHARD M. FRANK
Chief Assistant Attorney General
THEODORA BERGER,
Senior Assistant Attorney General
RAÏSSA S. LERNER*
Deputy Attorney General
**Counsel of Record*

California Department of Justice
P.O. Box 70550
Oakland, CA 94612-0550
Telephone: (510) 622-2100
Facsimile: (510) 622-2270

Counsel for People of the State of California ex rel. Bill Lockyer, Attorney General

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QUESTION PRESENTED

Did the Court of Appeals for the District of Columbia Circuit act properly when it explicitly applied the usual pleading standards of Federal Rules of Civil Procedure 8(a) and 12(b)(6) to affirm dismissal of a complaint, where the complaint's allegations that the President exceeded his very broad discretion to establish a national monument under the Antiquities Act failed to state a claim upon which relief could be granted?

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INTRODUCTION

In the nearly 100-year history of the Antiquities Act, no court has ever struck down a national monument created under the Act. Following this well-established body of law, the Court of Appeals for the District of Columbia Circuit correctly reached the conclusion that petitioners' complaint fails to allege facts sufficient to demonstrate that the President overstepped the bounds of his authority under the Antiquities Act in creating the Giant Sequoia National Monument. As every court that has considered the issue has ruled, judicial review of a presidential proclamation creating a national monument is limited to determining whether the President acted within his authority under the Act, and does not encompass evaluation of the manner in which the President exercised his discretion. There is no unresolved question of law at issue in this case.

Lacking any basis in the substantive law, petitioners attempt to make an issue of pleading requirements by attributing the use of the "heightened pleading" standard to the District of Columbia Circuit. On the contrary, the Court of Appeals expressly stated that it did not apply a "heightened pleading standard." Rather, the Court of Appeals applied the usual and unremarkable standards found in Federal Rules of Civil Procedure 8(a) and 12(b)(6) to find, correctly, that the complaint did not state any facts that would entitle petitioners to relief. The petition thus raises no issues appropriate for certiorari, and should be denied.

STATEMENT OF THE CASE

A. The Proclamation

On April 15, 2000, the President issued a Proclamation creating the Giant Sequoia National Monument in the central Sierra Nevada region of California, pursuant to the discretion conferred on him by the Antiquities Act of 1906, 16 U.S.C. § 431. The Proclamation identifies numerous objects of scientific and historic value for protection within approximately 327,769 acres of federal lands. Such objects include some of the last remaining groves of ancient giant sequoias – the world's largest and among its longest-lived trees – and the surrounding ecosystems necessary to their survival, as well as paleontological resources documenting tens of thousands of years of ecosystem change, fossilized evidence of Pleistocene Era giant sequoia growth, unique geologic and volcanic formations such as granitic domes, spires and gorges, Native American archeological sites, remnants of early Euroamerican settlement, and rare and endemic plant and animal species. Proclamation No. 7295, 65 Fed.Reg. 24,095 (April 15, 2000), reprinted in Petitioners' Appendix ("Pet. App.") 35-40. The Proclamation states that it encompasses "the smallest area compatible with the proper care and management of the objects to be protected as identified in the [Proclamation]." Pet. App. 40.

The Proclamation provides that "[n]o portion of the monument shall be considered to be suited for timber production, and no part . . . shall be used in a calculation or provision of a sustained yield of timber from the Sequoia National Forest." Pet. App. 41. The Proclamation

provides that "establishment of this monument is subject to valid existing rights," including completion of timber sales under contract, and that tree removal may take place "if clearly needed for ecological restoration and maintenance or public safety." *Id.* The Proclamation forbids the building of new roads within the monument, "except to further the purposes of the monument." Pet. App. 42.

B. The Complaint

Tulare County and others ("petitioners" or "plaintiffs") sued, alleging that the President did not "reasonably identif[y] all the objects of historic or scientific interest which are necessary to justify the 327,769 acre Monument . . . with the specificity required by the Antiquities Act." Complaint, ¶¶ 136-138, Pet. App. 79-80 (Count I). The complaint also alleges that the Proclamation impermissibly protects landscapes, scenic areas, ecosystems and "amorphous and imprecise items" as objects of historic or scientific interest under the Act. Pet. App. 80-81 (Count II).

Relying on their claims that the Proclamation lacks detail and that landscapes, scenic areas, natural phenomena and ecosystems do not qualify for protection under the Act, plaintiffs further claim that the President designated "a grossly oversized Monument unnecessary for the protection of any objects of genuine historic or scientific interest." Pet. App. 82 (Count III); *see* Petition ("Pet.") 14. Count IV alleges that the Proclamation harms, rather than protects, any such objects by increasing the likelihood of wildfire. Pet. App. 83-84. Count V alleges that if the Proclamation is within the President's authority

under the Antiquities Act, then the Act is an unconstitutional delegation of Congressional power because it lacks "meaningful limitation." Pet. App. 84-85.[1/]

C. Opinions Below

The district court dismissed the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), for failure to state a claim for which relief may be granted. *Tulare County v. Bush*, 185 F.Supp.2d 18, 29-30 (D.D.C. 2001), reprinted at Pet. App. 11. The Court of Appeals affirmed, holding that because the Antiquities Act allows the President, "in his discretion," to declare "objects of historic or scientific interest . . . to be national monuments," judicial review is not available to evaluate the President's exercise of discretion, but only to determine whether he acted *ultra vires* his authority under the Act. *Tulare County v. Bush*, 306 F.3d 1138, 1141-44 (D.C. Cir. 2002), reprinted at Pet. App. 1, 4-9.

Plaintiffs sought rehearing en banc, arguing that the panel applied a "heightened standard" in affirming dismissal of the complaint. No member of the District of Columbia Circuit requested a vote on rehearing, and the panel issued a Statement clarifying that it had "examined the complaint against a no more rigorous standard of pleading than that of Fed.R.Civ.P. 8(a)." *Tulare County v. Bush*, 317 F.3d 227 (D.C. Cir. 2003) (denying rehearing en banc), reprinted at Pet. App. 34.

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1. The remaining claims are not encompassed within the questions presented in the petition for certiorari.

The Court of Appeals held that Counts I-IV do not contain allegations that, if proven, demonstrate that the President acted outside his authority under the Antiquities Act: Count I seeks descriptive detail that the Act does not require, thus failing as a matter of law to state a claim for relief (Pet. App. 5); Count II fails because the Proclamation's designation of landscapes, ecosystems, and other natural and man-made objects as objects of historic or scientific interest under the Act is consistent with Supreme Court precedent. Pet. App. 6. *See Cappaert v. United States*, 426 U.S. 128, 141-42 (1976); *Cameron v. United States*, 252 U.S. 450, 456 (1920).

The Court of Appeals rejected Counts III and IV as conclusory and without factual foundation. Pet. App. 6-8. The court noted that the complaint fails to allege that any part of the Monument lacks historic or scientific objects, or is not necessary for the protection of such objects. Pet. App. 7; *see also* Pet. App. 34. Rather, the sole premise underlying Count III is that, of the many historic and scientific objects identified for protection, only the sequoia groves (allegedly comprising just 6% of the monument area) qualify for protection. *See* Pet. 14. But the Court of Appeals, in disapproving Count II, rejected this premise as a matter of law. Pet. App. 7. Regarding Count IV, the Proclamation observes that "'a century of fire suppression and logging'" has created increased fire hazards, and specifically provides for management of these threats. Pet. App. 7-8. The court noted that the complaint contains no allegations that this provision fails to protect objects of scientific or historic value identified in the Proclamation, and thus does not state a claim for relief. Pet. App. 8.

Finally, the Court of Appeals applied this Court's non-delegation framework to assess whether the Antiquities Act is an unconstitutional delegation of Congressional power to the President, *see, e.g., Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 474 (2001), and concluded that the "statute includes intelligible principles to guide the President's action." Pet. App. 8; *Mountain States Legal Found. v. Bush*, 306 F.3d 1132, 1137 (D.C. Cir. 2002). It therefore rejected petitioners' constitutional claim.

REASONS FOR DENYING THE PETITION

I. Certiorari Is Not Warranted Because, in Affirming Dismissal of the Complaint, the Court of Appeals Explicitly Stated That it Followed Rules 8(a) and 12(b)(6), and Did Not Apply a "Heightened Pleading Standard," as Alleged By Petitioners

The petition rests entirely on the suggestion that the District of Columbia Circuit applied a "heightened pleading standard" in affirming dismissal of the complaint. The Court of Appeals, however, specified that it did not subject the complaint to a heightened pleading standard (Pet. App. 34), and examination of the Court's opinions confirms that it did not do so. Rather, the Court held that petitioners failed to allege any facts (as opposed to conclusory statements) that, if proven, would demonstrate that the Proclamation exceeds the President's broad discretion to establish a national monument under the Antiquities Act. Since the complaint lacks allegations sufficient to entitle petitioners to relief, the Court of

Appeals affirmed dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6). Pet. App. 2.

A. Certiorari is Not Warranted Because the Court of Appeals Properly Selected the Pleading Standard Set Forth in Rule 8(a)

As the Court of Appeals itself stated, the court "examined the complaint against a no more rigorous standard of pleading than that of Fed.R.Civ.P. 8(a)." Pet. App. 34. In so doing, the court determined that plaintiffs had failed to allege that any part of the monument is devoid of "objects of historic or scientific interest" (16 U.S.C. § 431) that the President sought to protect. Pet. App. 34.

Petitioners would have this Court believe that the Court of Appeals – despite its statement to the contrary – actually applied a "heightened pleading standard" to affirm dismissal of their complaint. Petitioners are mistaken. Nothing in the decision below supports petitioners' suggestion that the Court of Appeals misrepresented the standard it applied. Rather, the discretion vested in the President under the Antiquities Act occasioned the demise of petitioners' complaint.

B. Having Correctly Chosen the Usual Pleading Standard of Rule 8(a), the Court of Appeals Properly Applied That Standard in Concluding That Petitioners' Complaint Does Not Entitle Them To Relief

The decision below affirming dismissal of the complaint for failure to state a claim upon which relief

may be granted is correct. The only way to obtain the relief petitioners seek is to show that the President acted outside the discretion vested in him by the Antiquities Act. The Court of Appeals properly held that each of petitioners' claims that the President did so fails as a matter of law. The allegations in their complaint thus do not entitle petitioners to any relief.

Count I was properly dismissed because petitioners' assertion[2/] that the Antiquities Act requires a greater level of "specificity" in identifying objects for protection than the Proclamation provides is incorrect. Pet. App. 5. The Act authorizes the President, "in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments." 16 U.S.C. § 431. The Court of Appeals found that the Proclamation did so. Pet. App. 5. No greater pleading standard was applied than simple measurement of plaintiffs' assertions against the broad discretion vested in the President by the Act itself. *See Cameron*, 252 U.S. at 455-56.

Count II was properly dismissed because plaintiffs' assertion that the Antiquities Act does not permit designation of landscapes and ecosystems for protection is inconsistent with Supreme Court precedent. Pet. App. 6. *See Cappaert*, 426 U.S. at 141-42. Petitioners do not argue that this aspect of the Court of Appeals' holding is incorrect or inconsistent with Supreme Court precedent or

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2. *See* Complaint ¶¶ 136-139, Pet. App. 79-80).

with the holdings of any other court and, plainly, it is not. *See Cameron*, 252 U.S. at 455-56 (endorsing designation of entire Grand Canyon area as national monument); *Anaconda Copper Co. v. Andrus*, 14 Env't Rep. Cas. (BNA) 1853, 1855 (D. Alaska 1980) (assessing proclamations creating national monuments on vast areas of federal land in Alaska "against the authority of the President as it has been recognized in *Cappaert* and in *Cameron*," and concluding that "matters of scientific interest which involve geological formations or which may involve plant, animal or fish life are within this reach of the presidential authority under the Antiquities Act.").

The Court of Appeals properly affirmed dismissal of Count III upon measurement of plaintiffs' allegations against the President's broad authority to establish national monuments. As the court explained, the premise of plaintiffs' claim[3] that the Proclamation creates a "grossly oversized Monument" (Pet. App. 82, ¶ 150) – *i.e.*, that the giant sequoia groves, allegedly comprising just 6% of the Monument, are the only objects identified in the Proclamation that lawfully may be protected under the Act – is flawed as a matter of law. Pet. App. 7; Pet. App. 34. Plaintiffs did not allege that any part of the Monument lacks objects identified for protection in the Proclamation, or is unnecessary for their proper care and management. Pet. App. 34. Thus the court accurately determined that no set of facts consistent with plaintiffs' allegations could be proved that would entitle them to relief.

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3. *See* Pet. 14.

The Court of Appeals affirmed dismissal of Count IV because – contrary to the complaint's assertion that the Proclamation blindly increases the risk of "catastrophic fire" – the Proclamation expressly acknowledges and provides for management of the well-known and well-documented risks of wildfire. Pet. App. 7-8. The fact that it does not employ plaintiffs' preferred tool of commercial logging to achieve that aim does not support a claim that the President violated the Antiquities Act.

Finally, the Court of Appeals held that the Act "includes intelligible principles to guide the President's action," and thus does not run afoul of the non-delegation doctrine articulated by this Court. Pet. App. 8. The complaint simply lacks allegations that would prove the President acted outside those guidelines. Pet. App. 5-8.

Petitioners argue that the Antiquities Act is without meaningful limitation, and thus violates the non-delegation doctrine, if a court does not undertake to determine how many objects is too many to protect, how historic or how scientific the objects should be, how much protection they deserve, or how small an area is "the smallest" compatible with proper care and management of the objects. But this argument founders on this Court's admonition that, when Congress delegates its powers:

> [W]e have never demanded, as the Court of Appeals did here, that statutes provide a "determinate criterion" for saying "how much [of the regulated harm] is too much." In *Touby* [*v. United States*], for example, we did not require the statute to decree how "imminent" was too imminent, or how "necessary" was necessary

> enough, or even – most relevant here – how "hazardous" was too hazardous. 500 U.S., at 165-67, 111 S.Ct. 1752 [(1991)]. . . . It is therefore not conclusive for delegation purposes that . . . the EPA [is permitted] to make judgments of degree.

Am. Trucking, 531 U.S. at 475. Judicial review is not available to petitioners because their allegations fail to make a legally cognizable claim that the President acted outside the bounds of his discretion in determining where and how he would create the Giant Sequoia National Monument.

Petitioners' complaint failed not because the Court of Appeals raised the bar, but because establishment of a national monument cannot be overturned on the allegations they put forth. In the nearly 100-year history of the Antiquities Act, no court has struck down a national monument created under the Act. *See Cameron*, 252 U.S. at 455-56 (upholding monument established to protect unique geology, scientific interest and public appeal of Grand Canyon); *Cappaert*, 426 U.S. at 141-42 (upholding monument created to protect unique pupfish species and hydrology of Devil's Hole); *United States v. California*, 436 U.S. 32, 36 (1978) (endorsing monument created to protect marine life, fossils and geology of Channel Islands); *Wyoming v. Franke*, 58 F.Supp. 890, 895 (D. Wyo. 1945) (upholding Jackson Hole National Monument, created to protect evidence of "the early fur industry of the West, structures of glacial formation and peculiar

mineral deposits and plant [and animal] life indigenous to the particular area"); *Anaconda*, 14 Env't Rep. Cas. at 1854-55 (upholding creation of monument to protect "matters of scientific interest which involve geological formations, or . . . plant, animal or fish life").

C. Because the Court of Appeals Applied the Correct Pleading Standard Under Rules 8(a) and 12(b)(6), Cases Cited By Petitioner, Where This Court Struck Down a Lower Court's Adoption of a "Heightened Pleading Standard," Are Irrelevant

In an effort to obtain certiorari, petitioners cite a series of cases where the Court of Appeals had deliberately adopted a "heightened pleading standard" for evaluation of a claim at the pleading stage.[4] Because the District of Columbia Circuit expressly applied the usual pleading standard under Federal Rules of Civil Procedure 8(a) and 12(b)(6), petitioners' citations and accompanying argument are irrelevant.

In each of the cases petitioners cite, the Court of Appeals concluded that a heightened pleading standard was required or appropriate to evaluate a particular type of

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4. Petitioners rely principally on *Crawford-El v. Britton*, 523 U.S. 574 (1998), *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993), and *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002). Pet. 11, 18-22.

claim, and this Court ruled that the lower court had selected the wrong standard. In *Leatherman*, this Court struck down a heightened pleading rule fashioned by the Fifth Circuit for limiting cases that allege municipal liability. 507 U.S. at 164-69. Similarly, in *Crawford-El*, the Court struck down a heightened pleading standard adopted by the Court of Appeals to weed out improper motive cases against public officials that are "easy to allege but hard to disprove." 523 U.S. at 584-85. In *Swierkiewicz*, this Court dealt with the Second Circuit's requirement that employment discrimination plaintiffs must plead the elements of a *prima facie* case sufficient to raise an inference of discrimination in order to survive a motion to dismiss. 543 U.S. at 510. The Court held that this pleading standard impermissibly exceeds the requirements of Fed.R.Civ.P 8(a). 543 U.S. at 513-14.

The decision below in this case does not run afoul of any of the cited precedents because, as the Court of Appeals itself explained, "[c]ontrary to Tulare County's argument, the court examined the complaint against a no more rigorous standard of pleading than that of Fed.R.Civ.P. 8(a)." Pet. App. 34. Rather than conflicting with this Court's prior holdings, the decision below is consistent with the understanding that, except for claims specified in Fed.R.Civ.P. 9(b), the only pleading requirement under Rule 8(a) is a "short and plain statement" giving defendant fair notice of the claim and the grounds for relief sought. *Leatherman*, 507 U.S. at 168. The court simply assessed the complaint's factual assertions against the law framing each claim, and

determined, pursuant to Rule 12(b)(6), that they did not state a claim for which relief may be granted.

Petitioners' narrow focus on the notice pleading requirements of Rule 8(a) neglects to account for the effect of Rule 12(b)(6), which permits dismissal if the allegations in the complaint do not set forth any claim for which *relief may be granted.* Fed.R.Civ.P. 12(b)(6). The District of Columbia Circuit held that the complaint could not survive a motion to dismiss because the allegations, even if true, do not demonstrate that the President exceeded his authority under the Antiquities Act: the objects identified for protection and their description in the Proclamation are valid under the Act; the complaint does not allege that any part of the Monument lacks objects of historic and/or scientific interest; and the Proclamation on its face demonstrates that the Monument does not increase the risk of wildfire. Thus the complaint fails to state a claim for which relief is available.

In this case, no justification exists for correcting the approach of the court below in evaluating complaints at the pleading stage, as in *Leatherman*, *Crawford-El*, and *Swierkiewicz*. In those cases, the courts below mistakenly believed that application of a heightened pleading standard to the particular claims presented was appropriate. No such error occurred here. Rather, petitioners seek a judicial override of the President's judgment in creating the Giant Sequoia National Monument – a judgment that is well within the President's discretion under the Antiquities Act.

D. A Mere Claim of Error Does Not Justify Invocation of This Court's Review

At best, the petition claims that the court below erred in assessing the adequacy of the complaint's factual assertions in stating a claim for relief under the Act. A claim of error is not grounds for certiorari, however. Sup.Ct.R. 10. This Court is not another appellate forum for petitioners' claims, and alleged lower court errors are not the focus of this Court's jurisdiction. *Id.*; *see Ross v. Moffitt*, 417 U.S. 600, 616-617 (1974).

This Court may grant certiorari where the court below "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." Sup.Ct.R. 10(a). A petition is rarely granted, however, "when the asserted error consists of . . . the misapplication of a properly stated rule of law." Sup.Ct.R. 10. Nor does this Court typically grant certiorari merely for the purpose of correcting a perceived error in a Court of Appeals decision, or to achieve justice in a particular case. *See Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 122 (1994).

The District of Columbia Circuit clearly does not take issue with the applicability of Rule 8(a) to this type of case, and there is no reason to doubt the Court of Appeals' own assurances that it does not. The petition's repeated assertion that a different decision should have issued does not, alone, merit this Court's attention. The decision

below creates no conflict among the circuits, or with this Court's precedents. Nor did it decide an important question of federal law that requires this Court's elucidation for its effective administration. Petitioners present no reason, beyond their own desire to litigate this matter without filing an adequate complaint, for invoking the jurisdiction of the United States Supreme Court. The petition therefore should be denied.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: July 8, 2003

Respectfully submitted,

BILL LOCKYER
Attorney General of California
RICHARD M. FRANK
Chief Assistant Attorney General
THEODORA BERGER
Senior Assistant Attorney General
RAÏSSA S. LERNER*
Deputy Attorney General
**Counsel of Record*
California Department of Justice
P.O. Box 70550
Oakland, CA 94612-0550
(510) 622-2131

Counsel For Respondent, People of the State of California ex rel. Bill Lockyer, Attorney General